Nos. 06-969 & 06-970

In the Supreme Court of the United States

FEDERAL ELECTION COMMISSION, *Appellant*
v.
WISCONSIN RIGHT TO LIFE, *Appellee*

SENATOR JOHN MCCAIN ET AL., *Intervenor-Appellants*
v.
WISCONSIN RIGHT TO LIFE, *Appellee*

On Appeal from the United States District Court
for the District of Columbia

BRIEF OF FAMILY RESEARCH COUNCIL, FREE MARKET FOUNDATION, AND HOME SCHOOL LEGAL DEFENSE ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF APPELLEE

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March 23, 2007

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTERESTS OF *AMICI CURIAE*[1]

The Family Research Council is a nonprofit, research and educational organization dedicated to advancing a family-centered philosophy of public life through policy research and outreach to the news media, the academic and business communities and the general public. As part of its educational activity, the Council frequently urges its constituents to contact their elected representatives to request that they vote in favor of or opposition to pending legislation on family and religious liberty issues of interest to the constituency.

The Free Market Foundation is a nonprofit, research and advocacy organization committed to protecting freedom in the marketplace and freedom in the exchange of ideas in a democratic republic. As a core aspect of its mission, the Foundation regularly engages in grassroots lobbying in support of these principles.

The Home School Legal Defense Association is a nonprofit advocacy organization that promotes families' freedom to homeschool their children. As an essential element of its mission, the Association engages in significant grassroots advocacy at both the state and federal levels. Such advocacy requires the ability to communicate with members whenever an issue arises, without regard to the proximity of federal elections.

Organizations like *Amici* have long been the lifeblood of the nation's democracy, enabling ordinary Americans to en-

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. In accordance with Rule 37.6, *Amici* state that this brief was not written in whole or in part by counsel for any party, and no persons other than *Amici* have made a monetary contribution to the preparation or submission of this brief.

gage in civic life and political speech. Tocqueville noted upon visiting the United States that "the most democratic country on earth is found to be, above all, the one where men . . . have most perfected the art of pursuing the object of their common desires in common." Alexis de Tocqueville, *Democracy in America* 490 (Harvey C. Mansfield & Delba Winthrop eds. 2000) (1840). He observed further that "freedom of association has become a necessary guarantee against the tyranny of the majority," *id.* at 183, and that, "[i]f men who live in democratic countries had neither the right nor the taste to unite in political goals, their independence would run great risks," *id.* at 490.

Amici believe that permitting the Government to restrict core political speech by nonprofit, citizen advocacy organizations during fixed pre-election time periods gravely undermines political liberty and democracy:

> [A]ctive liberty is particularly at risk when law restricts speech directly related to the shaping of public opinion, for example, speech that takes place in areas related to politics and policy-making by elected officials. That special risk justifies especially strong pro-speech judicial presumptions. It also justifies careful review whenever the speech in question seeks to shape public opinion, particularly if that opinion in turn will affect the political process and the kind of society in which we live.

Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* 42 (2005).

Amici have been chilled in their grassroots advocacy during periods preceding elections for fear of running afoul of the legal provisions challenged in this case. Indeed, one *Amicus*, the Family Research Council, has specifically curtailed pre-election broadcast advertising in which it previously had engaged. *Amici* respectfully urge the Court to affirm the judgment below.

SUMMARY OF ARGUMENT

Appellants suggest that the prohibition in Section 203 of the Bipartisan Campaign Reform Act ("BCRA") against corporate "electioneering communications" is something other than a ban on core political speech warranting strict scrutiny under the First Amendment. *Amici* respectfully submit that this is incorrect. As experience since this Court's decision in *McConnell v. FEC*, 540 U.S. 93 (2003), demonstrates, BCRA effectively forecloses *Amici* and other small, nonprofit, grassroots advocacy groups altogether from running pre-election broadcast issue ads. The *MCFL* exception is so grudgingly administered by the FEC that virtually no group engaged in "electioneering communications" qualifies for this exception in practice. Political action committees ("PACs") are unavailable to § 501(c)(3) corporations as a matter of law, and are so costly and difficult to maintain that only large, sophisticated corporations can employ them. And while as-applied challenges remain available in theory, they have proved, as in this case, to be protracted battles that cannot be won until long after the relevant election.

Contrary to Appellants' arguments, the "electioneering communications" provision cannot satisfy strict scrutiny, at least with respect to nonprofit, grassroots advocacy groups like Appellee and *Amici*. To begin with, there is no compelling interest to support it. Speech by nonprofit advocacy groups on behalf of their members does not "corrupt" candidates or "distort" the political marketplace. Instead, it is Section 203 that distorts, leaving wealthy individuals and corporate media conglomerates unfettered in their pre-election broadcast advocacy, and inducing sophisticated corporations to turn to alternatives such as PACs, while thwarting speech by individuals of moderate means who have banded together in grassroots groups to express their views.

But even if Section 203 did serve some compelling interest, it still would not be adequately tailored to achieving

it. Nonprofit advocacy groups funded by individuals are readily distinguished from for-profit corporations funded by general treasuries. Indeed, Section 203 as passed by Congress initially contained a less restrictive alternative that would have reached only the latter: BCRA's original "Snowe-Jeffords exception" would have permitted nonprofit groups to fund electioneering communications with contributions from individual supporters. Yet Congress eliminated that exception by enacting the "Wellstone Amendment." *Amici* respectfully submit that this Court should now hold that provision unconstitutional, severing it from BCRA, restoring the less restrictive Snowe-Jeffords exception, and giving grassroots advocacy at election time the breathing room the First Amendment requires.

ARGUMENT

I. SECTION 203 OPERATES IN PRACTICE AS AN EFFECTIVE BAN ON GRASSROOTS ADVOCACY BY MANY NONPROFIT GROUPS IN KEY MEDIA DURING KEY PERIODS OF LEGISLATIVE ACTIVITY

Section 203 of BCRA prohibits any mention of a federal candidate in a broadcast advertisement during specified preelection "blackout" periods—even by nonprofit, grassroots advocacy groups that are vital contributors to the nation's political discourse.[2] In upholding § 203 against facial chal-

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[2] Section 203 of BCRA prohibits corporations and labor unions from funding "electioneering communications." 2 U.S.C. § 441b(a) (2000). Section 201 defines "electioneering communications" as "any broadcast, cable, or satellite communication which (I) refers to a clearly identified candidate for Federal office; (II) is made within (aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or (bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and (III) in the case of a

lenge, this Court downplayed its adverse effects on grassroots democracy, characterizing it as a mere burden, not a ban, that simply displaces core political speech into other time periods or other vehicles such as PACs. *See McConnell v. FEC*, 540 U.S. 93, 204 (2003). The FEC and the Intervenors similarly downplay the practical force of § 203 in limiting grassroots democracy. *See, e.g.*, Brief of Intervenor-Appellants ("Int. Br.") at 29, *Senator John McCain et al. v. Wisconsin Right to Life*, No. 06-970 (2007).

The practical reality since *McConnell* demonstrates otherwise. In fact, for many nonprofit advocacy organizations like *Amici*, pre-election blackouts on "electioneering communications" are tantamount to a ban on core political speech, disabling grassroots issue advocacy at precisely the times when it might be most pressing. Under § 203, for example, grassroots nonprofits like *Amici* would be unable to broadcast messages informing listeners of their Representative's position on a particular legislative proposal—even one as significant as a possible constitutional amendment regarding marital status or a statutory ban on late-term abortion—simply because incumbent officeholders chose to introduce it after the blackout period had begun.

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communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate." 2 U.S.C. § 434(f)(3) (Supp. IV 2004).

Section 203(b) of BCRA would have exempted electioneering communications by nonprofit advocacy groups incorporated under § 501(c)(4) and § 527(e)(1) of the Internal Revenue Code so long as they were "paid for exclusively by funds provided directly by individuals." 2 U.S.C. § 441b(c)(2). But that exemption was designedly negated by § 204 of BCRA, which withdraws the exception for § 501(c)(4) and § 527(e)(1) corporations in the case of expenditures for "targeted communications"—which, by definition, include *all* "electioneering communications." *See* 2 U.S.C. § 441b(c)(6)(A) (Supp. IV 2004).

None of the exceptions or alternatives that § 203 supposedly leaves open in fact suffices, as a practical matter, to give relief from this effective ban on core grassroots advocacy. First, while the FEC has interpreted this Court's decision in *FEC v. Massachusetts Citizens for Life, Inc.* ("MCFL"), 479 U.S. 238 (1986), to require § 203 exemptions for *some* grassroots organizations, such exceptions are, under current FEC practice, unavailable to the overwhelming majority of grassroots advocacy groups. Second, while this Court has suggested that PACs might provide an alternative vehicle for issue advocacy, the daunting legal, financial and administrative difficulties of forming a PAC are prohibitive for most small grassroots advocacy groups. Third, as WRTL's own experience in this case demonstrates, as-applied judicial challenges have proved ineffective in protecting grassroots broadcasts in the relatively short time periods before their political relevance evaporates. For these reasons, § 203 merits strict scrutiny under the First Amendment.

A. Section 203 Effectively Bans Grassroots Advocacy in Key Media During Key Time Periods

Section 203 imposes political broadcast blackouts of dizzying temporal and geographic scope. These blackouts in fact span much of the map during much of the political calendar by virtue of the timing of primary elections in the several States. For example, a primary election may be run in a single State but nonetheless force a blackout on a broadcast media market that overlaps state lines, depriving voters in adjacent states of broadcasts even outside the period preceding their own primary elections.

But even if the 60-day blackout period preceding the general election is considered on its own, it is clear that it blocks vital political advocacy by grassroots groups. The United States Congress, unlike the British Parliament and other legislatures, remains in session during the election sea-

son. Thus, the period preceding an election is a time in which legislative activity typically increases and incumbent legislators are more likely to listen to their constituents.

Within the 60 days preceding the 2004 general election, for example, there were 499 bills and resolutions introduced in the House of Representatives, *see* http://thomas.loc.gov/bss/d108query.html (select "Introduced in House" under "Stage in Legislative Process" for dates 9/2/2004 to 11/2/2004), which marked a 156% increase over the 320 introduced in the previous two-month period, *id.* (select "Introduced in House" under "Stage in Legislative Process" for dates 7/2/2004 to 9/2/2004). Six of these bills were proposed amendments to the Constitution; one, the "Marriage Protection Amendment," was both introduced and sent to a vote during the period.

Within the 60-day blackout period, the House and Senate in recent years have also debated such issues as impeachment of the President, *see* Authorizing the Committee on the Judiciary to Investigate Whether Sufficient Grounds Exist for the Impeachment of William Jefferson Clinton, President of the United States, 144 Cong. Rec. H10,096 (daily ed. Oct. 8, 1998); limitations on "partial birth" abortion, *see Votes in Congress*, N.Y. Times, Sept. 20, 1998, section 1, at 48; judicial nominations, *see Wisconsin Right to Life v. FEC*, 2004 WL 3622736, at *1 (D.D.C. 2004), *vacated*, 546 U.S. 410 (2006); creation of the Department of Homeland Security, *see* Homeland Security Act of 2002, 148 Cong. Rec. S8,155 (daily ed. Sept. 4, 2002); and appropriation bills, *see, e.g.*, Carl Hulse, *As Deadline Nears, Congress Slogs in a Fiscal Quagmire*, N.Y. Times, Sept. 5, 2002, at A19.

Thus, it is a fallacy to suppose that § 203 limits political speech in only a narrow or inconsequential window of time. Nor does § 203 limit the speech of only a narrow class of speakers. Some might suppose that the impact of § 203 is felt only by large, sophisticated corporations that can afford

to pay the extravagant costs associated with purchasing television airtime. To the contrary, however, § 203 sweeps within its prohibitions even inexpensive methods of grassroots advocacy by small nonprofit corporations supported by persons of ordinary income.

Prohibited "electioneering communications" include, for example, *radio* broadcasts that provide a cheaper, simpler alternative to television broadcasting.[3] Section 203 thus impairs a relatively inexpensive means for grassroots groups to communicate with the public in numerous markets. It also prevents grassroots organizations that do amass funds to run a single or limited number of television ads from targeting those scarce resources to the most relevant time period.

B. Few Grassroots Advocacy Groups Can Benefit in Practice from the FEC's *MCFL* Exception

Because this Court has long recognized that "[s]ome corporations have features more akin to voluntary political associations than business firms, and therefore should not have to bear burdens on independent spending solely because of their incorporated status," *MCFL*, 479 U.S. at 263, the FEC has made theoretically available a so-called *MCFL* exception to the strictures of § 203. As administered on the ground, however, the *MCFL* exception has proved all but illusory. Only a scant few of the nonprofit, grassroots advocacy groups whose

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[3] For example, Google has an "Audio Ads" program through which organizations can upload radio ads and select target audience demographics; Google, in turn, bids out such ads to radio stations. *See Bringing Radio Advertising to Google Advertisers: An Update*, Inside Adwords, Dec. 7, 2006, http://adwords.blogspot.com/2006/12/bringing-radio-advertising-to-google.html. The cost of broadcasting a national 30-second radio ad through Google's bidding program is as low as $500 per week. *See* Troy Janish, *See How They Run: Radio Ads and Google*, Wisconsin Technology Network, Mar. 13, 2007, http://wistechnology.com/article.php?id=3768.

speech § 203 limits have obtained the exception, often only after great difficulty, delay and expense.

To begin with, the FEC's definition of an *MCFL* organization is narrower than that of this Court. MCFL itself was permitted to make independent expenditures because it "was formed for the express purpose of promoting political ideas," had "no shareholders or other persons affiliated so as to have a claim on its assets or earnings," and "was not established by a business corporation or a labor union." *Id.*

The FEC, by contrast, requires "qualified nonprofit corporations" ("QNCs") to meet more stringent criteria in order to qualify for the *MCFL* exception. *See* 11 C.F.R. § 114.10 (2006). Corporations organized under § 501(c)(3) of the Internal Revenue Code are categorically disqualified. And in order be *MCFL*-exempt, a nonprofit must prove to the FEC that its "*only* express purpose is the promotion of political ideas," that it *never* "directly or indirectly accept[s] donations of anything of value from business corporations," and that its members receive *no* benefits that *might* provide a "disincentive for them to disassociate themselves with the corporation on the basis of the corporation's position on a political issue." *Id.* §§ 114.10 (c)(1)-(5) (2006) (emphasis added).

These procrustean requirements make it very difficult in practice for nonprofit corporations to obtain *MCFL* status from the FEC. Grassroots advocacy organizations like *Amici* may not run broadcast ads mentioning candidates during blackout periods if they have received a single dollar in corporate or labor contributions,[4] devoted themselves to ideo-

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[4] Acceptance of corporate contributions in relatively small amounts by nonprofit, grassroots groups is commonplace. For instance, the Ben & Jerry's ice cream company makes donations at its board's discretion of over $1.1 million annually to § 501(c)(3) and other nonprofit groups. *See* Ben & Jerry's Foundation Home Page, http://www.benjerry.com/foundation/. Hundreds of other corporations have similar giving programs. *See, e.g.*, Target Cor-

logical but apolitical purposes, extended a credit-card program to their members, or raised any money (for example, through bake sales, t-shirt sales, or paid advertising in newsletters) that was not specifically and expressly denominated as for a political purpose. *See* 11 C.F.R. § 114.10(b)(3)(ii).[5]

Not surprisingly, very few nonprofits ever qualify as *MCFL* organizations under these draconian rules. Since 2003, *only fourteen nonprofit groups* broadcasting political ads have qualified for the *MCFL* exception; most of these are organizations with a sizeable infrastructure like the League of Conservation Voters, the National Resources Defense Council, and Swift Boat Veterans for Truth.[6] Of the approximately 70 organizations filing with the FEC as *MCFL*-exempt, only about twenty were not affiliated with Planned Parenthood, and most of these had sizeable parent organiza-

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poration, Target Grants, http://sites.target.com/site/en/corporate/page.jsp?contentId=PRD03-004090 (noting that Target sets aside 5% of annual profits for distribution to § 501(c)(3) nonprofits through grants in $1000-$3000 amounts); Google.org, http://www.google.org (describing "Google Grants" program through which Google, Inc. has donated $33 million in advertising to § 501(c)(3) organizations).

[5] *See also* Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures, 60 Fed. Reg. 35,300 (July 6, 1995) (stating that "credit cards . . . will be considered disincentives to disassociate. Consequently, corporations that offer such things as affinity credit cards . . . will not be qualified nonprofit corporations"); *id.* at 35,298 (explaining that "a corporation that publishes a newsletter or magazine and sells advertising space in that publication will be engaging in business activities, and will not be a qualified nonprofit corporation").

[6] *See* Federal Election Commission, Electioneering Communications Reports, http://www.fec.gov/finance/disclosure/ec_table.shtml (listing organizations engaged in electioneering communications).

tions like the National Abortion Rights Action League or Defenders of Wildlife.[7]

Four circuits have recognized that the *MCFL* exemption as codified by the FEC is too grudging. The Fourth Circuit held that a nonprofit corporation was entitled to the *MCFL* exemption when it received corporate contributions comprising less than eight percent of its overall revenue. *Beaumont v. FEC*, 278 F.3d 261, 273 (4th Cir. 2002), *rev'd on other grounds*, 539 U.S. 146 (2003). The D.C. Circuit held that the NRA's $1,000 in corporate receipts was *de minimis* and therefore did not disqualify the organization from classification as *MCFL*-exempt. *FEC v. Nat'l Rifle Ass'n*, 254 F.3d 173, 192 (D.C. Cir. 2001). The Eighth Circuit held that an organization was entitled to the *MCFL* exemption even though it engaged in "minor business activities" and received "insignificant contributions from business corporations." *Minnesota Citizens Concerned for Life v. FEC* ("*MCCL*"), 113 F.3d 129, 130 (8th Cir. 1997). And the Second Circuit has held that "a nonprofit political advocacy corporation, which in fact receives no significant funding from unions or business corporations, does not surrender its First Amendment freedoms." *FEC v. Survival Educ. Fund*, 65 F.3d 285 (2d Cir. 1995).

Each of these court of appeals decisions recognized that, when an incorporated group is "formed to disseminate political ideas, not to amass capital," then the mere receipt of a "small amount of corporate contributions" will not make such a group "a conduit for the type of direct spending [by for-profit corporations] that creates a threat to the political marketplace." *Beaumont*, 278 F.3d at 266 & n.2 (internal

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[7] *See* Federal Election Commission, FEC Disclosure Reports Advanced Search, http://www.fec.gov/finance/disclosure/advsearch.shtml (select "Independent Expenditure (Person or Group, Not a Committee)" under "Committee Type"; compare groups with a nine-digit "Committee ID" that begins "C9000").

quotations omitted). In seeking to limit these decisions, however, *see MCCL*, 113 F.3d at 130, the FEC has stated that "knowingly accepted prohibited donations will void a corporation's [*MCFL*] exemption, even if the corporation accepts only a *de minimis* amount." 60 Fed. Reg. at 35,301.

To obtain even these limited judicial victories, each grassroots group had to go to painstaking lengths in litigating against the FEC. And, despite these holdings, the FEC's regulations have not relented. Thus, the *MCFL* exception remains illusory from the perspective of groups like Appellee and *Amici*, available if at all only through costly, protracted and hard-fought battles against the Government's regulators.

C. PACs Are Not a Realistic Alternative for Many Grassroots Advocacy Organizations

This Court suggested in *McConnell* that advocacy groups like Appellee and *Amici*, when unable to qualify for MCFL status, can simply form PACs in order fund political ads. *See* 540 U.S. at 105-06, 204.[8] The FEC and Intervenors likewise trumpet PACs as ready alternatives for grassroots advocacy. *See* Brief of Appellant ("FEC Br.") at 3-4, *FEC v. Wisconsin Right to Life*, No. 06-969 (2007); Int. Br. 29-30. But the PAC alternative is in fact legally foreclosed to many nonprofit organizations, and prohibitively burdensome, expensive, or unsavory to many others.

1. PACs Are Foreclosed to § 501(c)(3) Organizations

Nonprofit advocacy corporations that qualify for tax exemption under Internal Revenue Code § 501(c)(3) are categorically forbidden from forming PACs, because they are barred from conducting *all* political activities. Specifically,

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[8] A corporation is permitted to fund electioneering communications and express advocacy through a PAC. *See* 11 C.F.R. §§ 114.5 & 114.11.

they are prohibited from "political campaign intervention," which includes "any and all activities that favor or oppose one or more candidates for public office."[9] For this reason, the IRS simply will not permit a § 501(c)(3) corporation to form a PAC. *See* Treas. Reg. § 1.527-6(g) (prohibiting § 501(c)(3) organizations from forming PACs); I.R.S. Tech. Adv. Mem. 200446033 (Nov. 12, 2004) (stating that a 501(c)(3) will be deemed to have intervened in a political campaign if it supports the establishment of a PAC).[10]

The FEC sought by rule to preserve the ability of § 501(c)(3) organizations to broadcast genuine issue ads that might technically fall within the definition of "electioneering communications." *See* Electioneering Communications, 70 Fed. Reg. 49508 (proposed Aug. 24, 2005). But that effort

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[9]Internal Revenue Service, Election Year Activities and the Prohibition on Political Campaign Intervention for Section 501(c)(3) Organizations (FS-2006-17) (2006). The prohibition covers both "direct" and "indirect" forms of intervention, Treas. Reg. § 1.501(c)(3)-1(b)(3)(ii) (2006), in campaigns, and prevents "the publication or distribution of written or printed statements or the making of oral statements on behalf of or in opposition to such a candidate," Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii) (2006). Penalties for political intervention can include revocation of the organization's tax-exempt status or in extreme circumstances, retroactive tax liability. *See* I.R.C. §§ 4955, 6852 (2006).

[10] Although the IRS has historically given § 501(c)(3) organizations some leeway to engage in communications technically considered "electioneering" under the FEC definition, it has recently begun aggressively enforcing the prohibition. *See, e.g.*, Internal Revenue Service, Project 302: Political Activities Compliance Initiative 25 (Final Report) (2006) (noting an increase in resources available to pursue proactive investigations). The IRS even investigated one California church because its rector encouraged his congregation to "vote your deepest values" during a Sunday sermon. *See* Patricia Ward Biederman & Jason Felch, *Antiwar Sermon Brings IRS Warning*, L.A. Times, Nov. 7, 2005.

was ultimately invalidated in light of BCRA. *See Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004), *aff'd* 414 F.3d 76 (D.C. Cir. 2005).

2. PAC Formation Imposes Significant Regulatory Burdens and Costs

While PACs are in theory available to some nonprofits devoted to issue advocacy, the battery of regulations governing the formation and operation of PACs impose often prohibitive difficulty, expense, and delay.

First, a PAC must assume a cumbersome array of, reporting and accounting obligations.[11] Second, a PAC's fundraising ability is severely limited. A PAC may solicit donations only from a "restricted class," 11 C.F.R. § 114.1(j), which in the case of a nonprofit advocacy group, typically includes its members, its administrative personnel, and their respective families. *See id.* Thus, a nonprofit PAC may not enlist all potential supporters for a particular issue, but only those previously enlisted as members. Like an airline that advertises not to all travelers, but only to those already signed up as frequent flyers, a PAC can receive only a fraction of its potential financial support. Third, PAC formation involves time-consuming procedures that retard the ability of grassroots advocacy groups to respond quickly to legislation that might crop up suddenly.[12] These regulatory burdens make PAC

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[11] *See* 11 C.F.R. § 102.2(a)(1)(iv) (appointment of treasurer); 11 C.F.R. § 104.1(a) (who must report); 11 C.F.R. §§ 102.2(a) & 104.14(a) (signing reports); 11 C.F.R. § 103.3(a) (depositing receipts); 11 C.F.R. § 102.7(c) (authorizing contributions and expenditures); 11 C.F.R. § 110.1(k)(3) (monitoring contributions); 11 C.F.R. §§ 102.9 & 104.14 (keeping records). Additional reporting requirements apply at the state level. *See* 2 U.S.C. §§ 433, 439.

[12] Unlike the large labor union or corporate parents of many PACs, grassroots advocacy groups often must rely upon contributions spawned by a particular political event like the introduction of a specific bill. *See, e.g.*, Madeline Stanionis, *When Only an*

formation infeasible for all but large, well-financed corporations.

3. Forming a PAC Contradicts the Mission of Some Apolitical Grassroots Groups

Even if PACs were in practice a viable alternative mode of speech, for many groups, PACs are anathema. As Justice Kennedy recognized in *McConnell*, "[a] requirement that coerces corporations to adopt alter egos in communicating with the public is, by itself, sufficient to make the PAC option a false choice for many civic organizations." *McConnell*, 540 U.S. at 332-33. The mission of many nonprofit advocacy groups like *Amici* is not to influence elections, but to advocate on issues. They therefore should not be required to operate as if they are essentially partisan, political committees.

D. As-applied Challenges to Section 203 Cannot Adequately Protect Grassroots Advocacy

Grassroots advocacy groups who seek to broadcast issue ads before elections can take little comfort in the possibility of bringing as-applied challenges to § 203. As the record in this case vividly illustrates, such challenges are expensive, protracted and uncertain—and, in any event, may be mooted altogether by the passage of time. In this case, WRTL still awaits judgment on the permissibility of ads it sought to broadcast *in 2004*.

Other grassroots advocacy groups have faced similar dilemmas. The Christian Civic League of Maine sought a preliminary injunction in April 2004 asking a district court to

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Online Appeal Will Do, Mal Warwick - Assoc. E-Newsl. (Mal Warwick Assoc., Berkeley, Cal.), July 2003, http://www.malwarwick.com/learning-resources/e-newsletters/jul03.html (describing NARAL's online fundraising drive triggered by the "partial-birth" abortion legislation of 2003, a drive that garnered its highest-ever return rate).

allow it to run a radio ad mentioning Maine Senators Snowe and Collins in connection with a federal marriage protection bill notwithstanding the blackout period. Not until September 2006 did the court issue a final decision, at which point it deemed the case moot. *Christian Civic League of Maine v. FEC*, No. 06-0614, slip op. at 7 (D.D.C. September 27, 2006), 2006 WL 2792683.

While the district court suggested that a grassroots group should simply sue earlier if it planned to broadcast an ad mentioning a candidate during a blackout period, such advice misconceives how issue advocacy works. Only groups that exist solely to influence elections can know what they might be saying before the next election; groups that respond to breaking issues cannot predict as much without the services of a soothsayer. Ironically, then, the groups most likely to deserve as-applied exceptions are least likely to be able to vindicate them in a timely fashion.

In sum, the "alternatives" supposedly available to *Amici* and like groups to fund "electioneering communications" despite § 203 are illusory. Section 203 operates in practice not merely to channel core political speech in key media in key time periods, but effectively to ban it. Accordingly, it merits strict First Amendment scrutiny.

II. NO COMPELLING INTEREST JUSTIFIES SECTION 203'S EFFECTIVE BAN ON PRE-ELECTION BROADCAST ISSUE ADVOCACY BY NONPROFIT GRASSROOTS GROUPS

Because § 203 operates as an effective ban on independent expenditures for broadcast advocacy by nonprofit grassroots groups during election time, it should be subject to the "exacting scrutiny" this Court has applied to other expenditure limitations in the campaign context. *Randall v. Sorrell*, 126 S.Ct. 2479, 2501 (2006); *see Colorado Republican Federal Campaign Comm. v. FEC*, 518 U.S. 604, 607 (1996);

Buckley v. Valeo, 424 U.S. 1, 16 (1976). Section 203 regulates independent expenditures, which is to say *speech*—as opposed to the coordinated expenditures that would amount to contributions. *See FEC v. Colorado Republican Federal Campaign Committee*, 518 U.S. 431, 470, 476 (2001). Accordingly, the FEC and Intervenors must demonstrate a compelling interest to which § 203 is narrowly tailored.

"The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 391 (2000). In this case, the government interests asserted are novel indeed. No prior decision of this Court has found upon record inquiry that "electioneering communications" by nonprofit grassroots organization threaten any government interest so compelling as to warrant suppression.

Congress has, to be sure, attempted to regulate election-related corporate expenditures since the early twentieth century. It has done so to prevent the corrupt exaction of *quid pro quo* favoritism more subtle than outright bribery with suitcases full of corporate cash. And it has done so to prevent distortion of the political marketplace through use of corporate war chests accumulated in the economic marketplace to fund express electoral speech. Nothing in these anti-corruption or antidistortion rationales, however, warrants the blackout of *any* broadcast by *any* nonprofit advocacy corporation that *so much as references* a candidate for federal office in the periods preceding elections.

A. Broadcast Advocacy By Nonprofit Grassroots Advocacy Groups Does Not Corrupt Candidates

The chief concern historically animating Congress's regulation of corporations' election-related spending "was the problem of corruption of elected representatives through the creation of political debts." *First Nat'l Bank of Boston v.*

Bellotti, 435 U.S. 765, 788 n.26 (1978). As one Senate leader explained in the debates preceding the Federal Corrupt Practices Act of 1925: "We all know . . . that one of the great political evils of the time is the apparent hold on political parties which business interests and certain organizations seek and sometimes obtain by reason of liberal campaign contributions." *United States v. Automobile Workers*, 352 U.S. 567, 576 (1957) (quoting Sen. Robinson, 65 Cong. Rec. 9507-08 (1924)) (ellipsis in original). This Court likewise acknowledged the anticorruption rationale in *Buckley*, holding that, "[t]o the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined . . . ." 424 U.S. at 27.

This traditional anticorruption rationale, however, cannot justify the strictures § 203 places upon pre-election broadcast issue advocacy by nonprofit grassroots groups. This Court has never held that prevention of *quid pro quo* corruption was an interest warranting limits on independent expenditures. *See id.* at 45-46. Nor did concern with *quid pro quo* surface in BCRA's legislative history; to the contrary, Members of Congress complained that independent expenditures imperiled their desired control over their campaigns, not that issue ads made their rivals beholden to the advertisers. *See, e.g.*, Statement of Rep. Wamp, 144 Cong. Rec. H4787 (June 18, 1998) ("Pretty soon we as candidates will not even be able to control the message in our own campaigns.").

B. Broadcast Advocacy By Nonprofit Grassroots Advocacy Groups Does Not Distort the Political Marketplace

In *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990), this Court for the first time upheld a restriction on independent political expenditures as satisfying strict scrutiny under the First Amendment. In upholding a ban on independent expenditures by a for-profit corporation, *Austin*

acknowledged a novel compelling interest—an interest in combating "the corrosive and distorting effects of [corporations'] immense aggregations of wealth." *Id.* at 660-61. By this reasoning, corporate wealth "unfairly" influences elections not by providing corrupt officials with reason to reward their corporate benefactors at the expense of the public, but rather by allowing corporations influence in the political marketplace that is a function of their economic wealth rather than their stakeholders' support of the ideas they espouse.

Amici respectfully submit that even on its own facts, involving a *for*-profit corporation, *Austin*'s antidistortion rationale is difficult to reconcile with this Court's free speech traditions. In *Buckley v. Valeo*, for example, the Court stated that "[t]he concept that the government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." 424 U.S. at 48-49. Likewise, this Court long held that "[t]he First Amendment rejects the highly paternalistic approach of statutes . . . which restrict what the people may hear." *Bellotti*, 435 U.S. at 792 n.30. To the extent that voters need to be better informed as to the source and *bona fides* of a particular advertisement in order to evaluate it effectively, the disclosure requirements of BCRA, which are not challenged in this case, serve that interest by means well short of an effective ban. *See, e.g.*, BCRA § 201, 2 U.S.C. § 434(f) (Supp. IV 2004).

But even if *Austin* were correctly decided with respect to the distorting effects of political speech by a *for*–profit corporation, that conclusion is inapplicable to speech by *non*-profit, grassroots advocacy groups like Appellee and *Amici*. This Court acknowledged in *Austin* the government's concern that "expenditures reflect actual public support for the political ideas espoused by corporations." 494 U.S. at 660. Of course, the expenditures of grassroots organizations do so. As this Court noted in *MCFL*, individuals contribute to nonprofit advocacy groups because such groups provide "a more

effective means of advocacy than spending the money under their own personal direction." *MCFL*, 479 U.S. at 261. Limiting the ability of nonprofit, grassroots advocacy groups to speak about issues of importance to them and to their individual supporters effectively silences people of modest means who band together to amplify their ideas in the political marketplace.

Moreover, the speech that the Court held regulable in *Austin* was express advocacy, a discrete and readily identified set that was, by definition, directed at influencing elections. Congress went much further in Title II of BCRA, defining and forbidding "a class of communications that are generally intended to influence electoral outcomes and are likely to have that effect." FEC Br. at 30. Even if *Austin* correctly identified a compelling interest in reducing the distorting effects of the corporate form in express advocacy by for-profit corporations, nothing in *Austin* presaged § 203's extension of this rationale to *Amici* or the ACLU alongside General Electric or General Motors. As this Court cautioned in *MCFL*, "[v]oluntary political associations do not suddenly present the specter of corruption merely by assuming the corporate form." 479 U.S. at 263.

C. Any Congressional Interest In Preventing Negative Advertising is Illegitimate

Because § 203 so poorly serves to prevent corruption or distortion as applied to grassroots nonprofits, it might be asked whether other motives may have been at work. To the extent that Members of Congress aimed to protect themselves from the unpleasant experience of "negative attack ads," their purpose was illegitimate. The public is entitled to hear negative advertisements, even around elections, no matter how much Members of Congress dislike them. *See generally McConnell*, 540 U.S. at 262-63 (Scalia, J., dissenting). Certainly deference to the judgment of the Legislature on election matters is inappropriate where it "risk[s] such

constitutional evils as, say, permitting incumbents to insulate themselves from effective electoral challenge." *Shrink Missouri*, 528 U.S. at 402 (Breyer, J., concurring). Congress' raw hostility to speech is not a legitimate interest, let alone a compelling one.

III. EVEN IF § 203 SERVES COMPELLING INTERESTS, IT IS NOT NARROWLY TAILORED TO ANY SUCH INTEREST

Were § 203's supposed ends compelling, its means are still far too ill-tailored to satisfy strict scrutiny. Strict scrutiny demands that any regulation of independent expenditures, even pursuant to a compelling interest, be pursued through the least restrictive means. *See, e.g.*, *Buckley*, 424 U.S. at 68; *United States v. Playboy Ent. Group*, 529 U.S. 803, 813 (2000); *Reno v. ACLU*, 521 U.S. 844, 874 (1997); *Sable Communications Inc. v. FCC*, 492 U.S. 115, 126 (1989); *Schaumburg v. Citizens for Better Env't*, 444 U.S. 620, 637 (1980); *NAACP v. Button*, 371 U.S. 415, 433 (1963).

Section 203 cannot satisfy this requirement. It is both overinclusive, sweeping in grassroots speech like that of *Amici* without preventing any demonstrable "corruption" or "distortion," and underinclusive, leaving wide berth for "corruption" and "distortion" of political markets through unfettered pre-election broadcast advocacy by rich individuals and media corporations and by the PACs that large and sophisticated corporations have the resources to form. These deficiencies could be avoided by restoring the original version of § 203, which would have permitted electioneering communications by nonprofit advocacy groups to the extent of their individual donations—a plainly less restrictive alternative.

A. In § 203 of BCRA, Congress Expressly Set Forth a Less Restrictive Alternative That *McConnell* Incorrectly Ignored

The best evidence that the current version of § 203 fails the narrow tailoring required by strict scrutiny is that Congress *itself* included within Title II a *less restrictive alternative* to an all-encompassing ban on "electioneering communications" by all corporations. Under the portion of § 203 known as the "Snowe-Jeffords amendment," organizations incorporated under Internal Revenue Code § 501(c)(4) and § 527(e)(1) would have been permitted to use their general treasury funds for "electioneering communications" so long as the communications were paid for exclusively with funds from individuals who are U.S. citizens, nationals, or lawfully admitted for permanent residence. 2 U.S.C. § 441b(c)(2). As Senator Jeffords explained, under the provision, "[a]ny organization can, and should be able to, use their grassroots communications to urge citizens to contact their lawmakers. Under the Snowe-Jeffords provision, any organization still can undertake this most important task." 147 Cong. Rec. S2813 (daily ed. March 23, 2001). The Snowe-Jeffords amendment thus provided an "exception for nonprofit corporations," representing a self-conscious "expansion of the law as it existed prior to BCRA." *McConnell v. FEC*, 251 F. Supp. 2d 176, 214 (D.D.C. 2003), *aff'd in part & rev'd in part*, 540 U.S. 93 (2003).

This exception was negated, however, by the addition of § 204 of BCRA, the so-called "Wellstone Amendment," which was inserted to *override* the Snowe-Jeffords exception of § 203 *in toto*. Section 204, now codified at 2 U.S.C. § 441b(c)(6), withdraws the exception for § 501(c)(4) and § 527(e)(1) corporations in the case of expenditures for "tar-

geted communications"—which, by definition, include *all* "electioneering communications."[13]

As Senator Wellstone explained the purpose of his superseding amendment: "It is to ensure that the sham issue ads run by interest groups fall under the same rules and prohibition that the McCain-Feingold legislation rightly imposes on corporations and union sham[] ads." BCRA, 147 Cong. Rec. S2846 (daily ed. Mar. 26, 2001). As Senator Wellstone further explained:

> Snowe-Jeffords forces disclosure of all ads that fall under this definition, but under this bill, only corporations and unions may not spend funds from their treasury or soft money for this purpose. . . . . [E]very other group and organization, pick and choose—it can be the NRA, it can be the Christian right, it can be the Sierra Club, it can be other organizations on the left, other organizations on the right, organizations representing every other kind of interest imaginable—they can continue to ... pour [money] into these sham ads.

Id. at S2846-47. In Senator Wellstone's view, the Snowe-Jeffords amendment of § 203 was unacceptable precisely because it would exempt certain nonprofit corporate speakers from the prohibition. The Wellstone Amendment aimed to close this perceived "loophole" by which nonprofit advocacy groups, conspicuously referenced by name, could otherwise

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[13] *Compare* 2 U.S.C. § 441b(c)(6)(A) (withdrawing Snowe-Jeffords amendment "in the case of a targeted communication") *with* 2 U.S.C § 441b(c)(6)(B) (defining "targeted communication" as coextensive with statutory definition of "electioneering communication"). *See McConnell*, 540 U.S. at 339 (Kennedy, J., concurring); *McConnell*, 251 F. Supp. 2d at 185 ("Section 204 ('The Wellstone Amendment'), in effect, withdraws the Snowe-Jeffords exception of Section 203.").

continue to exercise their First Amendment rights unimpeded by BCRA's electioneering-communications provisions.

While this Court recognized in *McConnell* that § 204 "does not, on its face, exempt *MCFL* organizations from its prohibition," 540 U.S. at 211, the Court nevertheless construed § 204 as including an exception for *MCFL* organizations in order to avoid the serious constitutional issue otherwise presented. *See id.* at 210-11. *Amici* respectfully submit that this was error. The canon of constitutional avoidance reflects a presumption of "respect for Congress," *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916), that serves the "basic democratic function of maintaining a set of statutes that reflect, rather than distort, the policy choices that elected representatives have made," *Almendarez-Torres v. United States*, 523 U.S. 224,238 (1998). But to trigger the canon, a "statute must be genuinely susceptible to two constructions." *Id.* Here, the statute with the Wellstone Amendment was unambiguous, rendering application of the avoidance canon inappropriate.[14]

McConnell erred further by ignoring Congress's specific prescription for reconciling BCRA with the First Amendment should the Wellstone Amendment prove unconstitutional. Congress went to extraordinary lengths to make the amend-

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[14] That "the Government itself concede[d] that § 316(c)(6) does not apply to MCFL organizations," *McConnell*, 540 U.S. at 211, is irrelevant. Neither the FEC nor the Solicitor General may cure the constitutional infirmity of § 204 by rewriting the statute contrary to Congress's express language and intent. *Cf. Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."); *id.* at 843 n.9. And they certainly cannot cure it by way of a speech restriction *broader* than that Congress itself provided by way of a less restrictive alternative, here the Snowe-Jeffords amendment of § 203.

ment severable and to provide a fallback scenario. As Senator Wellstone put it, "Under the worst case scenario, if the Supreme Court rules that groups covered by my amendment cannot be constitutionally barred from using treasury funds for these sham issue ads, then the rest of [BCRA] will be completely unaffected." 147 Cong. Rec. at S2847; *see* BCRA § 401 (providing that BCRA is subject to severability).[15]

Congress therefore made clear that, were the Wellstone Amendment's ban on electioneering communications by issue advocacy groups to be found unconstitutional, § 204 should be severed from the bill and the original Snowe-Jeffords provision of § 203 restored. By striking down the Wellstone amendment of § 204 as contrary to the constitutional dictate of *MCFL*, *without* restoring the Snowe-Jeffords exception of § 203 that was meant to serve in its stead, the Court effectively rewrote the statute.

To the extent that, per *Austin*, a compelling interest exists in avoiding distortion of the political marketplace through corporate war chests amassed in the economic marketplace, *see Austin*, 494 U.S. at 660, there is no doubt that exempting nonprofit advocacy groups from the ban on electioneering communications to the extent of their individual contributions would have been the less restrictive means of achieving it. Snowe-Jeffords directly addresses the *Austin* interest of preventing corporate money from distorting the contours of political debate at election time. The Court has held that

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[15] *See also McConnell*, 540 U.S. at 339 (Kennedy, J., concurring); *McConnell*, 251 F. Supp. 2d at 215 ("The Wellstone Amendment was codified in a separate section of BCRA in order to preserve severability: hence, if the Court finds the inclusion of section 501(c)(4) organizations and section 527 organizations within the ban on electioneering communications to be unconstitutional, the Wellstone Amendment can be cleanly struck from the law and the original Snowe-Jeffords exception for these groups will be restored.").

Congress may require a corporation's expenditures to bear a meaningful "correlation," *Austin*, 494 U.S. at 660, or to constitute a "rough barometer" of, the public's support for its political views. *MCFL*, 479 U.S. at 258. The Snowe-Jeffords provision, by permitting electioneering communications of nonprofit advocacy organizations only "if the communication is paid for exclusively by funds provided directly by individuals who are United States citizens or nationals or lawfully admitted for permanent residence," 2 U.S.C. § 441b(c)(2), vindicates that interest. It prevents large accumulations of corporate wealth from distorting political debate in ways "that have little or no correlation to the public's support for the corporation's political ideas," *Austin*, 494 U.S. at 660, while permitting advocacy that *does* correlate with public support because paid for exclusively by individual citizens.

Thus, this Court need only permit BCRA to have its congressionally intended effect in order to resolve this case and others like it involving nonprofit advocacy groups.[16]

B. The Ban On Electioneering Communications Is Overinclusive In Regulating Too Many Issue Ads By Grassroots Advocacy Groups

By sweeping genuine issue ads into the same net as ads intended to influence elections, § 203 regulates too many *speakers* relative to its accepted ends as well as too much

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[16] *Amici* understand from counsel for Appellee that, in accordance with the Snowe-Jeffords exception in § 203, WRTL has set up and tracked a separate fund consisting of individual contributions that might be used to fund "electioneering communications." Thus, invalidation of § 204 would suffice cleanly to dispose of this case. *Amici* further submit, however, that to the extent that § 501(c)(3) corporations are not expressly covered under the terms of the Snowe-Jeffords exception, they are constitutionally entitled to such exception no less than any other nonprofit funded by individuals.

speech. Nonprofit advocacy groups like *Amici* speak to issues of public policy and public values that naturally involve reference to candidates for federal office, without striving to swing any particular election result.

In *McConnell*, this Court discounted any notion that § 203, on its face, sweeps too broadly into "genuine issue ads," concluding that BCRA's application to pure issue ads was not substantial relative to its application to election-related advertising. *McConnell*, 540 U.S. at 207. If that conclusion appeared right at the time, then it has proved wrong since. This case amply attests that, as applied following *McConnell*, BCRA inhibits far more constitutionally protected speech, including pure issue advocacy than the Court may have originally surmised. WRTL's ads concerned a filibuster issue that loomed large in 2004, in reference to one Senator who was up for reelection and one who was not. Such ads are just the tip of the iceberg, as other *Amici* well demonstrate.

If anything, the FEC and Intervenors now seek even broader scope for § 203. Whereas this Court in *McConnell* repeatedly treated a broadcast issue advertisement's *purpose* as the touchstone, *see* 540 U.S. at 206, Appellants argue that WRTL's ads are regulable merely because "advertisements such as WRTL's would have an electoral *effect* in the context of the Wisconsin senatorial race." Int. Br. at 11 (emphasis added). Indeed, as justification for prohibiting WRTL's issue advertising, appellants offered testimony that, "within the political context of an election campaign, any advertising that addresses topics of current debate is *very likely to have electioneering effects, regardless of the purported purpose* of the ad." *Id.* (emphasis added). Setting aside any evidence about whether WRTL's ads were *intended* to influence the election, the FEC and Intervenors now insist that any *effect* on an election—irrespective of purpose—justifies suppression. In fact, they argue that because the judicial filibuster issue "played an important role" in the 2004 Wisconsin Senate race, *any*

advocacy relating to the judicial filibuster issue "would undoubtedly influence the election" and therefore could be suppressed under BCRA. *Id.* This argument suggests that § 203 may now sweep into its net issue-related political speech as to which the only objection is that it may ultimately have an effect on an election—a factor little more substantial than the weather on Election Day. Such a broad mandate to suppress issue advocacy that might influence public opinion exceeds anything sanctioned by this Court in *McConnell*. Either the interpretation of the law advanced by the FEC and Intervenors is wrong, or else, if it is right, then *McConnell* is due to be revisited and § 203's scheme as a whole struck down.

C. The Ban On Electioneering Communications Is Underinclusive In Permitting Unfettered Pre-Election Advocacy by Wealthy Individuals and Media Corporations

At the same time that nonprofits such as *Amici* and Appellee are restricted under § 203, wealthy individuals such as George Soros and Rupert Murdoch are able to convey *their* political views over the airwaves at unbridled strength. Likewise, mega-corporations like General Electric, Time Warner, Viacom, and Disney that happen to own broadcast stations, even while operating them in the economic realm for profit, can promote *their* political views, and others they may see fit to license, over the airwaves in the form of "news stor[ies], commentar[ies], or editorial[s]" that remain uncurbed in pre-election time periods. 2 U.S.C. § 434(f)(3)(B)(i); FECA § 304(f)(3)(B)(i) (BCRA electioneering communication media exemption). Finally, the most sophisticated and wealthy corporations can marshal their resources to utilize PACs and to devise other end-runs around BCRA.

The little guy is the biggest loser in all this. Small, organic, grassroots associations comprised of like-minded individuals of modest means are less likely to navigate the

daunting complexities and challenges of FEC regulations. *See MCFL*, 479 U.S. at 255. The predictable and obvious result—far better documented than the conjectural distortion rationale of *Austin* and *McConnell*—is that § 203 deprives the public of the voice of ordinary Americans relative to that of the moneied elite. What could be more distorting and antithetical to the First Amendment?

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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March 23, 2007